

**STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION**

COMPLAINT AGAINST:

HON. DIANE M. HATHAWAY

Michigan Supreme Court
3034 W. Grand Blvd.
Suite 8-500
Detroit, Michigan 48202

Formal Complaint No. 91

COMPLAINT

The Michigan Judicial Tenure Commission (“JTC”) authorized and directed the filing of this complaint against Hon. Diane Marie Hathaway (“Respondent”), a Justice of the Michigan Supreme Court. This action is taken pursuant to the authority of the JTC under Article 6, Section 30 of the Michigan Constitution of 1963, as amended, and MCR 9.200 *et seq.*

1. Respondent is, and at all material times was, a justice of the Supreme Court, State of Michigan.

2. As a judge, Respondent is subject to all the duties and responsibilities imposed on her by the Michigan Supreme Court, including those under the Code of Judicial Conduct, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.

3. Respondent has been a licensed real estate broker since 1987.

4. Respondent and her husband, Michael Kingsley (“Kingsley”), purchased the property located at 15834 Lakeview Court, Grosse Pointe Park, Michigan (“Lakeview Court property”) on August 14, 2001, which they maintained as their primary residence. They sold it in a short sale to Robert and Kathleen Garvey (“the Garveys”) in November 2011.

5. ING Bank or ING Direct (“ING”) held a mortgage on the Lakeview Court property.

6. On or about December 8, 2008, Respondent spoke by phone with a representative of ING, inquiring about a possible short sale of the Lakeview Court property.

7. As a result of that conversation, ING sent Respondent and/or Kingsley a Financial Worksheet used to apply for a short sale, consisting of a cover letter and a Customer Information Summary.

8. On January 26, 2009, Respondent had another conversation with a representative of ING, stating that she wanted to do a short sale but was not certain if Kingsley had received the financial worksheet.

9. That same day, the ING representative sent another financial worksheet to Respondent and Kingsley, by both regular mail and e-mail.

10. Neither Respondent nor Kingsley submitted the financial worksheet or any documents required to apply for a short sale to ING in 2008 or 2009.

11. On January 25, 2010, Respondent again contacted ING and spoke with a representative about the short sale process.

12. On September 27, 2010, Respondent spoke with two different representatives of ING and again discussed a short sale for the Lakeview Court property.

13. In October or November 2010, Respondent and Kingsley retained the law firm of Aronoff & Linnell to represent them regarding the submission of a short sale application to ING relating to the Lakeview Court property.

14. On November 19, 2010, Respondent, together with her attorney Richard Linnell (“Linnell”), spoke on the telephone with a representative of ING regarding a possible short sale for Lakeview Court.

15. During that conversation, Respondent and Linnell discussed Respondent’s financial status with the ING representative, and Linnell represented that Respondent would be retiring “next year” (*i.e.*, in 2011).

16. Respondent, who participated in that conversation, did not dispute that statement or otherwise advise the ING representative that it was erroneous.

17. During the conversation, Linnell further advised the ING representative that Respondent and/or Kingsley were being sued for a seven-figure “loan.”

18. Since 2008, Kingsley had been engaged in litigation regarding the 2005 sale of an apartment complex located at 12850 Woodward, Highland Park, Michigan.

19. The ING representative stated that those facts did not support a financial hardship, as they were hypothetical.

20. ING sent another copy of the financial worksheet to Respondent and/or Kingsley following that November 19, 2010, telephone conversation.

21. On or about November 29, 2010, Respondent received an offer to purchase the Lakeview Court property from the Garveys for \$750,000.

22. On or around December 14, 2010, Aronoff & Linnell submitted a short sale application to ING on Respondent’s behalf, which included various financial documents, and a Customer Information Summary prepared by Respondent and Kingsley.

23. In those documents, Respondent and Kingsley identified their financial hardship as:

- (a) Substantially reduced income for Kingsley (lost his major client);
- (b) “Serious personal issues” which make it impossible for either party to keep their home;
- (c) Savings having been used up on house payments, maintaining property, property taxes, and defending lawsuit;
- (d) Having to borrow money to make last payment; and
- (e) “We can no longer afford the costs of this house.”

24. At the time Respondent and Kingsley submitted the short sale application to ING, the outstanding balance on their mortgage on Lakeview Court was approximately \$1.4 million.

25. On or about April 21, 2011, negotiations resulted in the final purchase price of \$850,000 for the Lakeview Court property, pending the short sale approval.

26. On or about June 17, 2011, an ING representative sent an e-mail to attorney Steven Schulist (“Schulist”) of Aronoff & Linnell, making an inquiry about Respondent and Kingsley’s ownership of several other parcels of property, including:

- (a) Property located at 19229 Linville, Grosse Pointe Woods, Michigan (“the Linville property”);

- (b) Property located at 2709 Butler Bay Drive North, Windermere, Florida (“the Florida property”); and
- (c) 15812-14 Windmill Pointe, Grosse Pointe Park, Michigan (“the Windmill Pointe property”).

27. In June 2011, Respondent provided the following information to Mr. Schulist, in response to his inquiry, which he then passed on to ING:

- (a) Respondent’s stepson, Michael Kingsley, Jr., owned the Linville property;
- (b) Respondent and Kingsley did not own the Florida property;
- (c) Respondent and Kingsley did not own the Windmill Pointe property.

28. Respondent withheld from ING, while the short sale application was still pending and while Respondent was claiming a financial hardship, that:

- (a) Regarding the Florida property
 - i. Respondent and Kingsley *had* owned the Florida property, having purchased it on January 18, 1999. It was unencumbered by any mortgage or other debt, and had a 2010 assessed market value (based on tax records) of \$664,682.
 - ii. In March 2010, they transferred it to Kingsley’s daughter (Respondent’s step-daughter) Kathryn Sterr (“Sterr”) for \$10.
 - iii. Sterr never moved into the Florida property and never lived there.

- iv. Kingsley continued to pay the real estate taxes and the utilities on the Florida property, and he was still paying them in June 2011.
- (b) Respondent's stepdaughters Sterr and Sarah Kingsley owned the Linville property (not her stepson, Michael Kingsley, Jr., as she had told ING).
- (c) Regarding the Windmill Pointe property
 - i. In April 2010, Respondent purchased the property for \$168,000 cash.
 - ii. In September 2010, Respondent transferred it to Kingsley's son (Respondent's stepson) Michael Kingsley, Jr. for \$100.

29. In her answer to the JTC's request for her comments, Respondent admitted transferring the Florida property to Sterr (her step-daughter) "because Mr. Kingsley was involved in a lawsuit . . . [and] he did not want the property to be put in his name and for that reason [Respondent and Kingsley] transferred it to his eldest daughter, Kathryn Sterr."

30. Respondent also failed to disclose to ING, while the short sale application was still pending and while Respondent was claiming a financial hardship, that:

- (a) On March 22, 2011, while the short sale application was pending, Respondent provided her stepdaughter, Sarah Kingsley, with \$195,000 to purchase a home located at 1030 Balfour, Grosse Pointe Park, Michigan ("Balfour").

- (b) No mortgage or loan document was ever filed with the Wayne County Register of Deeds reflecting that the Balfour property secured any indebtedness by Sarah Kingsley to Respondent.

31. On or about August 27, 2011, an ING representative e-mailed Respondent's attorney's office, inquiring whether Respondent had retired and what the status of the lawsuit was, requesting documentation on each issue.

32. On September 2, 2011, Linnell forwarded ING's requests for information to Respondent and Kingsley. The e-mail noted that the application for the short sale would not be submitted for written approval until Respondent and Kingsley provided:

- (a) A report on Respondent's retirement. Linnell had advised the ING representative that she had not yet retired, but that it was anticipated this would be happening in the foreseeable future. Linnell reported that was not acceptable to the ING representative, and he asked Respondent for a more substantive response he could give to ING.
- (b) The status of the lawsuit against Kingsley.

33. On or about September 6, 2011, Linnell reported to ING in an e-mail that Respondent was going to meet with fellow members of the court and "political people" in the first part of January 2012 to determine her retirement date, and that she expected to retire "shortly thereafter."

34. The e-mail also reported to ING that the lawsuit against Kingsley was set for evaluation in October 2011, the trial was set for the spring, and the amount in controversy was \$1.2 million.

35. On or about October 21, 2011, ING approved the short sale of the Lakeview Court property, contingent on Respondent and Kingsley contributing \$10,000 toward the property taxes.

36. On or about October 23, 2011, Schulist e-mailed ING that Respondent and Kingsley planned on moving into a home that their “daughter” owned, and would pay rent to her.

37. Respondent failed to disclose to ING that the home she and Kingsley planned to move into and pay rent on was the Balfour property, the one that Kingsley’s daughter (Respondent’s stepdaughter) Sarah Kingsley had purchased for \$195,000 cash, which Respondent had provided her in March 2011, while the short sale application was still pending and while Respondent was claiming a financial hardship.

38. On or about October 24, 2011, ING issued a notice to Respondent and Kingsley that the short sale was approved, contingent on the transaction closing by November 9, 2011.

39. Between November 7 and 9, 2011, the sale of the Lakeview Court property to the Garveys closed for \$850,000.

40. On or about November 21, 2011, ING discharged the mortgage on the Lakeview Court property, eliminating approximately \$600,000 of debt for Respondent and Kingsley.

41. On December 1, 2011, Sarah Kingsley deeded the Balfour property to Respondent and Kingsley for less than \$100.

42. Respondent and Kingsley maintained the Balfour property as their residence at least through September 2012, and through that date owned the property unencumbered by a mortgage.

43. On March 5, 2012, Sterr deeded the Florida property back to Respondent and Kingsley for \$10.

44. On May 8, 2012, Respondent filed gift tax returns for the transfer of the Florida and Windmill Pointe properties, although each was due no later than April 18, 2011.

45. On May 9, 2012, a television news report aired that raised questions regarding the short sale of the Lakeview Court property and the other property transfers aired, where the reporter represented that he attempted numerous times to

obtain Respondent's comment on the property transfers over a period of six weeks before the story aired.

COUNT I

FRAUD AS PROHIBITED BY STATE COMMON LAW

46. Respondent's acts as described above constitute fraud under Michigan common law, including:

- (a) Common law fraud; and
- (b) Silent fraud.

COUNT II

FRAUD AS PROHIBITED BY STATE STATUTES

47. Respondent's acts as described above constitute fraud under Michigan statutes, including:

- (a) Fraudulent conveyance of assets to avoid a creditor and/or potential creditor, in violation of MCL 566.34; and
- (b) False pretenses (a/k/a criminal fraud), in violation of MCL 750.218.

COUNT III

FRAUD AS PROHIBITED BY FEDERAL LAW

48. Respondent's acts as described above constitute financial institution fraud (a/k/a bank fraud), in violation of 18 USC 1344.

COUNT IV

FEDERAL MONEY LAUNDERING

49. Respondent's acts as described above constitute money laundering, in violation of 18 USC 1956.

COUNT V

TAX VIOLATIONS UNDER FEDERAL LAW

50. Respondent's acts as described above constitute violations of federal laws relating to the reporting, assessment, and collection of taxes, including:

- (a) Attempt to evade or defeat a tax, in violation of 26 USC 7201;
- (b) Tax fraud (including filing false income tax returns), in violation 26 USC 7206;
- (c) False statements to the Internal Revenue Service, in violation of 18 USC 1001 and 26 USC 7206;
- (d) Conspiracy to commit tax fraud, in violation of 18 USC 371; and
- (e) Failure to file gift tax returns, in violation of 26 USC 6019.

COUNT VI

MISREPRESENTATIONS TO THE COMMISSION

51. In response to the Commission's request, Respondent submitted her comments regarding the above matters in a letter dated September 28, 2012.

52. On page 2 of her comment, Respondent denied having "any communication with ING," when in fact she had conversations with ING representatives (relevant to a short sale) on:

- (a) December 8, 2008;
- (b) January 26, 2009;
- (c) January 25, 2010;
- (d) September 27, 2010 (apparently either two calls or Respondent spoke with two individuals during one call);
and
- (e) November 19, 2010 (with attorney Rick Linnell).

53. On page 10 of her comment, Respondent asserted that neither she nor Kingsley had any direct contact with any representative of ING during the pendency of the short sale, while at a minimum she had contact on the dates identified above.

54. On page 11, Respondent asserted that neither she nor Kingsley was a party to communications that may have been exchanged between ING and the

attorneys, while at a minimum she engaged in at least the November 19, 2010 telephone conversation with Linnell and ING.

55. Also on page 11, Respondent asserted that she was never copied on written or oral communication between ING and the law firm, while at a minimum she participated in the November 19, 2010 telephone conversation with Linnell and ING.

56. Also on page 11 of her comment, Respondent asserted that she told the attorneys that she “no longer owned” the Florida and Windmill Pointe properties, revealing ownership on a prior date. However, while the short sale was pending, Respondent advised her counsel, who advised ING, that she and Kingsley “do not own” the properties, which does not reveal prior ownership.

57. On page 12 of her comment, Respondent asserted that she did not plan on running for re-election when her term ended, and she was considering leaving before her term ended but had to discuss the matter with others. However:

- (a) On November 19, 2010, Linnell represented that Respondent would be retiring “next year” (in a telephone conversation in which she participated and took no action to refute the statement); and
- (b) In an e-mail sent on September 6, 2011, Linnell asserted (based on information provided by Respondent) that she was meeting with others in January 2012 regarding her

retirement, and that she expected to retire “shortly thereafter.”

58. On pages 12 and 13 of her comment, Respondent denied that she ever represented that she was “scheduled to retire” as noted by ING personnel (which could reasonably have been concluded based on Respondent’s intentions forwarded to ING on or around September 6, 2011).

59. On page 13, Respondent asserted that she did not consider retirement a hardship, while she provided information concerning her retirement to ING to support her application for a short sale, at least during the telephone conference with counsel on November 19, 2010, and as reflected in the e-mail sent on or around September 6, 2011.

60. On page 15, Respondent asserted that she had no conversations, and did not exchange communications of any kind, with ING personnel, when she did on:

- (a) December 8, 2008;
- (b) January 26, 2009;
- (c) January 25, 2010;
- (d) September 27, 2010 (apparently either two calls, or Respondent spoke with two individuals during one call); and
- (e) November 19, 2010 (with attorney Rick Linnell).

61. On page 24 of her comment, Respondent asserted that she and Kingsley were not anticipating that the Lakeview Court property would be sold via a short sale when the Florida property was transferred (in March 2010), while Respondent had already made three inquiries to ING regarding a short sale for the property between December 2008 and January 2010.

62. On page 25, Respondent asserted that she and Kingsley were not anticipating that the Lakeview Court property would be sold via a short sale when the Windmill Pointe property was purchased (in April 2010), while Respondent had already made three inquiries to ING regarding a short sale for the property between December 2008 and January 2010.

63. On page 26, Respondent asserted that she was not considering that the Lakeview Court property would be sold via a short sale when Respondent put a deposit down on the Windmill Pointe property (in January 2010), while she had made two inquiries to ING regarding a short sale for the property between prior to that date, and a third only two days after the deposit was placed.

64. On page 33 of her comment, Respondent asserted that she did not receive a copy of the Customer Information Summary until “sometime shortly prior to the time she completed the form in December 2010,” while she and/or Kingsley were sent a copy by ING on December 8, 2008, and January 26, 2009.

65. Respondent's statements above, as reflected in her comment to the Commission dated September 28, 2012, constitute:

- (a) Conduct that is contrary to justice, ethics, honesty, or good morals, pursuant to MCR 9.104(3);
- (b) A failure to cooperate with a reasonable request of the Commission in its investigation, pursuant to MCR 9.205(B)(1)(f), and MCR 9.208(B);
- (c) Intentional misrepresentations and misleading statements to the Commission or its investigators, pursuant to MCR 9.205(B).

Respondent's conduct, as described in paragraphs 3 through 73 above, constitutes:

- a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;
- b) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205;
- c) Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1;
- d) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

- e) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;
- f) A failure to respect and observe the law, in violation of Code of Judicial Conduct Canon 2B;
- g) A failure to adopt a conduct and manner that promotes public confidence in the integrity of the judiciary, in violation of Code of Judicial Conduct Canon 2B;
- h) Allowing family relationships to influence judicial conduct, in violation of Code of Judicial Conduct Canon 2C;
- i) Utilizing the prestige of office to advance personal business interests, or those of others, contrary to Code of Judicial Conduct Canon 2C;
- j) Misuse of judicial office for personal advantage or gain, or for the advantage or gain of another, contrary to MCR 9.205(B)(1)(e);
- k) Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(A)(2);
- l) Conduct which is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3);
- m) Conduct that violates the standards or rules of professional conduct adopted by the Michigan Supreme Court, in violation of MCR 9.104(4); and
- n) Conduct that violates a criminal law of a state or of the United States, in violation of MCR 9.104(5).

Pursuant to MCR 9.209, Respondent is advised that an original verified answer to the foregoing complaint, and nine copies thereof, must be filed with the Commission within 14 days after service upon Respondent of the complaint. Such answer shall be in a form similar to the answer in a civil action in a circuit court and shall contain a full and fair disclosure of all the facts and circumstances pertaining to Respondent's alleged misconduct. The willful concealment, misrepresentation, or failure to file such answer and disclosure shall be additional grounds for disciplinary action under the complaint.

JUDICIAL TENURE COMMISSION
OF THE STATE OF MICHIGAN

3034 W. Grand Boulevard, Suite 8-450
Detroit, Michigan 48202

By: _____/s/
Paul Fischer (P35454)
Examiner

_____/s/
Casimir J. Swastek (P42767)
Associate Examiner

January 7, 2013